STATE OF MICHIGAN

COURT OF APPEALS

MALINDA A. GRAHAM, Personal Representative of the Estate of CALVIN MONROE GRAHAM,

Plaintiff-Appellant,

v

NATURICE INCORPORATED, VITACHLOR CORPORATION, and KEANE KOCISZEWSKI,

Defendants-Appellees.

and

ANTHONY WILEY ANDERSON, WAL-MART STORE INCORPORATED d/b/a SAM'S CLUB, and TRI-COUNTY SECURITY,

Defendants.

UNPUBLISHED
March 17, 2000

No. 212789
Wayne Circuit Court
LC No. 96-617271-NI

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiff appeals of right from an order granting summary disposition to defendants-appellees[1] pursuant to MCR 2.116(C)(8).[2] Plaintiff's complaint arose out of an automobile accident in which her husband was killed when his vehicle was struck by a stolen delivery van that was owned by Kociszewski, but was being driven by the thief, Anderson. We affirm.

This Court reviews de novo a trial court's decision to grant summary disposition as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. . . . A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. . . .' When deciding a motion brought

under this section, a court considers only the pleadings." *Id.* at 119. This issue also involves a question of statutory interpretation that is reviewed de novo. *Smith v Globe Life Ins Co,* 460 Mich 466, 458; 597 NW2d 28 (1999).

A. Liability Under The Owner's Liability Statute

Plaintiff first contends that the fact that Kociszewski carelessly or negligently left the vehicle unattended and unlocked, with the keys in the ignition and the engine running, was sufficient to establish implied consent to Anderson to drive the van. Plaintiff further argues that whether Kociszewski impliedly consented to the use of his vehicle by a thief was a question of fact for the jury. We disagree.

This issue requires interpretation of the Michigan Civil Liability Act, MCL 257.401; MSA 9.2101, more commonly known as the owner's liability statute. The statute provides in relevant part:

> This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by the common law. *The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge*. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family. [Emphasis supplied.]

This Court interprets statutes according to the plain meaning of their terms in order to effectuate the intent of the Legislature. *Yaldo v North Pointe Ins Co,* 457 Mich 341, 346; 578 NW2d 274 (1998). "The purpose of the [owner's liability] statute is to place the risk of damage or injury on the person who has the ultimate control of the motor vehicle, as well as on the person who is in immediate control." *North v Kolmyjec,* 199 Mich App 724, 726; 502 NW2d 765 (1993). "To subject an owner to liability under the statute, an injured person need only prove that the defendant is the owner of the vehicle and that *it was being operated with the defendant's knowledge or consent*." *Id.* at 726-727; emphasis supplied.

It is not disputed that the motor vehicle was owned by Kociszewski; nor is there any dispute that Kociszewski did not give his express consent to, and did not have knowledge of, Anderson's theft and operation of the vehicle. Plaintiff, relying on this Court's decision in *Osner v Boughner,*180 Mich App 248; 446 NW2d 873 (1989), argues that there was sufficient evidence that Kociszewski impliedly consented to Anderson driving his van; however, *Osner* does not support plaintiff's argument. In *Osner,* the owners expressly consented to the plaintiff driving their truck, and the plaintiff then expressly consented to the defendant operating the truck. *Id.* at 252-254, 266-267. This Court concluded that the evidence therefore raised a material question of fact regarding whether the owners impliedly

consented "to letting anyone else drive their truck who had been allowed to do so by [the plaintiff]." *Id.* at 267. In passing, this Court stated:

> Implied consent has been defined as "that manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given." Black's Law Dictionary (5th ed), p 276. [*Id.* at 266.]

In this case, there is no evidence to support the conclusion that Kociszewski impliedly consented to a thief driving his vehicle. The evidence indicated, and plaintiff did not dispute, that Kociszewski did not learn of the theft of his vehicle until he emerged from the Sam's Club after making his delivery. As Kociszewski points out, a theft is a taking without consent. *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993), aff'd 446 Mich 435 (1994); *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). Because the van was stolen, Kociszewski did not have knowledge of Anderson's operation of his van and he did not consent to Anderson operating the van. This Court concludes that it would be inconsistent with the very concept of consent to hold that an individual can impliedly consent to having their vehicle stolen.[3] This Court will not interpret statutes to arrive at absurd results. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

The owner's liability statute establishes a presumption of knowledge and consent if the vehicle is driven by a family member. MCL 257.401(1); MSA 9.2101(1). Anderson was clearly not a member of Kociszewski's family, so the statutory presumption does not apply. If someone other than a family member is driving the vehicle, there is a rebuttable common-law presumption that the owner expressly or impliedly consented to the driver's use of the vehicle. *Fout v Dietz*, 401 Mich 403, 405; 258 NW2d 53 (1977). This presumption may be overcome by positive, unequivocal, strong and credible evidence to the contrary. *Bieszck v Avis Rent-A-Car System, Inc*, 459 Mich 9, 19; 583 NW2d 691 (1998).

Plaintiff contends that this was a jury question. However, the issue of what constitutes implied consent under the owner's liability statute is a legal issue. *Caradonna v Arpino*, 177 Mich App 486, 488, 491; 442 NW2d 702 (1989) (trial court ruled as a matter of law on question of implied consent and this Court reversed, finding that defendant did not consent and therefore was not liable "as a matter of law for plaintiff's injuries"); *Thomas v Eppinga*, 179 Mich App 366, 369, 376; 445 NW2d 234 (1989) (trial court properly granted summary disposition to defendant after concluding that there was no evidence of express or implied consent where the owner left the keys under a floor mat in her unlocked vehicle). Similarly, in *Basgall v Kovach*, 156 Mich App 323, 329; 401 NW2d 638 (1986), this Court held that "[k]nowledge or consent must be proven by the surrounding circumstances and are matters for the triers of fact . . . *unless the court is satisfied that it is impossible for the claim of consent or knowledge to be supported by the evidence at trial*." [Emphasis supplied.]

Plaintiff's reliance on *Wingett v Moore*, 308 Mich 158; 13 NW2d 244 (1944) is misplaced. *Winsett* merely holds that if the facts regarding whether a theft occurred are in conflict, then it remains a jury question whether the owner impliedly gave his or her consent to the driver to use the vehicle. In this case, there was no dispute that Kociszewski's van was stolen by Anderson. When Kociszewski

emerged from the Sam's Club and found his van missing, he called the police to report a theft. The only contested facts were whether the keys were left in the ignition or in the console and whether the engine was running. Therefore, the trial court properly accepted the facts as presented by the nonmovant[4] and ruled as a matter of law that leaving the keys in the ignition of a vehicle with the engine running while the driver made a delivery does not constitute implied consent for a thief to steal the vehicle.

B. Liability Under A Negligence Theory

Plaintiff next contends that the trial court erred in granting summary disposition regarding her claim that Kociszewski was negligent in permitting Anderson to steal his vehicle, and that his negligence could be attributed to NaturIce under the doctrine of respondeat superior. We disagree.

This Court, in *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997), explained that:

> In order to establish a prima facie case of negligence, the plaintiff must prove: "(1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) that the plaintiff suffered damages." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996). Duty is an obligation that the defendant has to the plaintiff to avoid negligent conduct. *Id.* Whether a duty exists is a question of law for the court. *Simco v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). If a court determines as a matter of law that a defendant owed no duty to a plaintiff, summary disposition is appropriate under MCR 2.116(C)(8). *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 9; 492 NW2d 472 (1992).
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> In determining whether a duty exists, courts look to different variables, including the (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. *Buczkowski* [*v McKay*, 441 Mich 96, 101; 490 NW2d 330 (1992)], citing Prosser & Keeton, Torts (5th ed), § 53; p 359, n 24; *Baker*, *supra*. The mere fact that an event may be foreseeable is insufficient to impose a duty upon the defendant. *Buczkowski, supra* at 101. . . .

Plaintiff has placed her primary reliance on the alleged foreseeability of the harm to innocent third parties that could result from the theft of vehicles. However, the foreseeability of potential harm is only one of the factors used to determine whether a defendant owes a duty of care to a particular plaintiff. *Terry, supra*. "[T]he mere fact that an event may be foreseeable does not impose a duty upon the defendant to take some kind of action accordingly." *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975). Determination of whether defendants owed a duty of care to the decedent is analyzed using the factors set forth in *Buczkowski v McKay*, 441 Mich 96, 101, n 4; 490 NW2d 330 (1992) and *Terry, supra* at 424.

In *Terry, supra* at 426, this Court rejected the contention that the foreseeability that a thief might steal a car whose keys were left in the ignition required the imposition of a duty of care on the corporation that owned the vehicle and in whose keeping it was left. This Court stated:

> Thus, while it *may* be foreseeable to a vehicle owner that, if he leaves his keys in the ignition, the vehicle might be stolen and driven recklessly or negligently, we believe that this fact alone is insufficient to create liability in this type of case. [*Id.*]

Our Supreme Court has issued conflicting decisions regarding the liability of individuals for injuries caused by third parties who steal automobiles after the owners have left their keys in the ignitions. Compare *Corinti v Wittkopp*, 355 Mich 170, 171-172; 93 NW2d 906 (1959) (no liability despite owner's violation of a "key-in-the-ignition" statute) and *Davis v Thornton*, 384 Mich 138, 142; 180 NW2d 11 (1970) (violation of a "key-in-the-ignition" statute is evidence of negligence, and it was a jury question whether a reasonable person could foresee that leaving keys in the ignition might lead to theft of the vehicle and a personal injury accident). This Court subsequently distinguished *Davis* in *Thomas, supra* at 376-378, and determined that liability did not exist where the owner left the car key under the floor mat, the car was an older model, and it was parked in a residential neighborhood in broad daylight.

Our Supreme Court's decision in *Buczkowski, supra*, revised the manner in which courts were to evaluate the issue of whether a defendant owed a legal duty to a plaintiff. The Court rejected the view that the foreseeability of the harm was the only, or even the primary, consideration in determining whether one party owed a legal duty to the other. *Id*. at 100-101. Citing Prosser & Keeton, Torts (5th ed), §53, p 359, n 24, the Court listed a number of other variables that were consistently used by courts to determine legal duty: (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. *Buczkowski, supra* at 101, n 4. The Court stated that the ultimate determination of whether a legal duty was owed by one party to the other was a policy determination that was resolved by consideration of the above variables. *Id*. at 102-103.

Subsequently, in *Summers v Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994), a case involving the drowning of a nine-year-old who sneaked through a fence into a city-owned swimming pool while it was closed, this Court concluded that the individual employees who were sued did not owe any legal duty to the plaintiff. Responding to the plaintiff's argument that the individual defendants had violated a Detroit Building Code, the Court observed that this issue had not been raised below, but "[i]n any event, although violation of an ordinance may be some evidence of negligence, it is not in itself sufficient to impose a legal duty cognizable in negligence." *Id*. at 51-52.

In *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997), our Supreme Court discussed the concept of "duty" in the following terms:

> Generally, an individual has no duty to protect another who is endangered by a third person's conduct. Where there is a duty to protect an individual from a harm by a third person, that duty to exercise reasonable care arises from a "special relationship" either between the defendant and the victim, or the defendant and the third party who caused the injury. . . . Such a special relationship must be sufficiently strong to require a defendant to take action to benefit the injured party. [Footnotes and citations omitted.]

Finally, in *Terry, supra,* the plaintiffs were injured in a collision that occurred while a thief was fleeing from police after having stolen a General Motors Corporation (GM) employee car from a secured and guarded basement garage. The keys were left in the unlocked vehicle to facilitate vehicle upkeep and maintenance. *Id*. at 420-421. The plaintiffs alleged that GM owed them a duty to take reasonable measures to prevent the theft of the vehicle. *Id*. at 421. Rejecting the "special circumstances" approach utilized in *Thomas, supra* at 375, this Court concluded that, in light of the *Buczkowski* decision, GM did not owe the plaintiffs a duty to prevent cars from being stolen from its private garage.[5] *Id.* at 424-427. This Court rejected the plaintiffs' claim that the accident was foreseeable based on GM's alleged policy of leaving keys in unlocked vehicles and on other thefts that occurred. Instead, this Court concluded that "the accident was more closely connected to [the defendant's] criminal conduct in stealing GM's vehicle and driving recklessly." *Id*. at 427. This Court further stated that GM's conduct was not particularly blameworthy and that "the nexus between the conduct and plaintiffs' ultimate injury is too attenuated." *Id.* This Court concluded:

> In sum, we simply do not find that GM's practice of leaving keys in employee vehicles creates the kind of unreasonable risk of harm to third persons such as plaintiffs that would warrant the imposition of a duty under this state's common law. To hold otherwise would, in effect, make parties like GM insurers against the criminal misconduct of others. [*Id*. at 427-428.]

Kociszewski allegedly violated a Southfield "key-in-the-ignition" ordinance[6] and this constituted some evidence of negligence. *Summers, supra* at 52. However, as defendants point out, "[i]f no duty is owed by the defendant to the plaintiff, an ordinance violation committed by the defendant is not actionable as negligence." *Stevens v Drekich,* 178 Mich App 273, 278; 443 NW2d 401 (1989). The relevant factors do not establish that Kociszewski owed a duty of care to plaintiff's decedent. It was reasonably foreseeable that the van might be stolen if Kociszewski left the keys in the ignition with the engine running and the doors unlocked, although the fact that the van was parked next to the entrance of a busy retail store during broad daylight lessened the probability to some degree. However, as we observed in *Terry, supra* at 426, "while it *may* be foreseeable to a vehicle owner that, if he leaves his keys in the ignition, the vehicle might be stolen and driven recklessly or negligently, we believe that this fact alone is insufficient to create liability in this type of case."

Although it was certainly possible, it was not reasonably likely that an accident would occur while the thief was driving the stolen van away from the scene. Kociszewski's conduct in leaving the van available to theft was not closely related to the thief's negligent driving; that is, "the accident was more closely connected to [Anderson's] criminal conduct in stealing [Kociszewski's] vehicle and driving recklessly." *Terry, supra* at 427. There is only a slight moral blame attached to Kociszewski's

conduct in violating a "key-in-the-ignition" statute. *Id.* A policy of preventing future harm would be only minimally advanced by assigning liability to Kociszewski; insuring that delivery persons remove the keys from their vehicles and lock their trucks might discourage theft, but it could not absolutely prevent it. Finally, we conclude that it is inappropriate to impose liability on someone whose vehicle is stolen for the improper behavior of the thief. It is unlikely that placing this burden on vehicle owners will substantially reduce automobile theft; thousands of vehicles are stolen each day where the owners have removed the keys, locked the doors, and even installed alarm systems. Moreover, it is inappropriate to make the vehicle owner responsible for the unconsented criminal acts of a thief. "To hold otherwise would, in effect, make parties like [Kociszewski] insurers against the criminal misconduct of others." *Terry, supra* at 427-428.

C. NaturIce's Respondeat Superior Liability

Plaintiff also argues that Kociszewski is an employee or agent of NaturIce and therefore under the doctrine of respondeat superior NaturIce is liable along with Kociszewski for the theft of the van and the resultant fatality. Defendants respond that Kociszewski was an independent contractor and therefore NaturIce was not liable for Kociszewski's acts. *Holloway v Nassar,* 276 Mich 212, 217; 267 NW 619 (1936). The proper test to be used in determining whether someone is an independent contractor is the amount of control exercised by the alleged employer. *Marchand v Russell,* 257 Mich 96, 100-101; 241 NW 209 (1932). An independent contractor is defined as "one who, carrying out an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work." *Id.*

Since this Court has concluded that Kociszewski is not liable to plaintiff under the owner's liability statute, it follows that plaintiff had to establish that NaturIce was independently liable under that statute. Plaintiff failed to demonstrate such independent liability, instead relying solely on a theory of vicarious liability. The trial court therefore properly granted summary disposition to NaturIce for the claim concerning the owner's liability statute.

This Court further concludes that NaturIce did not owe a duty of care to plaintiff's decedent. NaturIce did not own the van that was stolen; it did not exercise any control over Kociszewski's daily activities or the manner in which he performed them – including the manner in which he parked his van while he made deliveries. There was no special relationship between NaturIce and plaintiff's decedent or between NaturIce and the thief. *Murdock, supra* at 54. Accordingly, NaturIce did not owe a duty of care to plaintiff's decedent and the trial court therefore correctly granted NaturIce's motion for summary disposition regarding plaintiff's negligence claim.

D. Summary Disposition Under MCR 2.116(C)(10)

Plaintiff finally claims that the trial court erred by failing to consider the motion for summary disposition under MCR 2.116(C)(10) which would have permitted the trial court to consider the documentation attached to plaintiff's pleadings. Plaintiff contends that this documentation demonstrated that a record might have been developed at trial that would support plaintiff's right to relief. Since the

trial court found that defendants were entitled to summary disposition under MCR 2.116(C)(8), it would have made no sense for the court to also determine if defendants were entitled to prevail under MCR 2.116(C)(10). In any event, under MCR 2.116(C)(10) it is not enough for plaintiff to show that she *might* prevail at trial; instead, plaintiff was "required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted." *Globe, supra* at 455, n 2. Thus, the trial court did not err by granting summary disposition under MCR 2.116(C)(8).

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens

[1] A default judgment was entered against defendant Anderson, and summary disposition was granted to defendant Wal-Mart Stores, Inc. Neither of those judgments have been appealed.

[2] The trial court's opinion purports to grant summary disposition pursuant to MCR 2.116(C)(8); however, the court makes reference to Kociszewski's deposition testimony and Anderson's affidavit in its opinion in the course of setting forth the factual background of the dispute. Nevertheless, the portion of the opinion that actually considers and decides the summary disposition motion refers only to plaintiff's pleadings and bases its conclusion solely on an analysis of the applicable law. We therefore conclude that the trial court did, indeed, base its ruling on MCR 2.116(C)(8). In any event, as we allude to below, we also conclude that the result would be the same even if the motion were considered under MCR 2.116(C)(10).

[3] The only exception to this general statement might be where an individual consents to have a thief steal his or her car in order to file a fraudulent insurance claim; however, even in that situation the consent would be express rather than implied.

[4] "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden, supra* at 119.

[5] This Court also rejected, "in light of *Buczkowski,*" the plaintiffs' reliance on *Davis, supra*. *Terry, supra* at 427, n 4.

[6] The ordinance relied on by plaintiff is Southfield traffic ordinance § 10.676.